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Supreme Court of the United States

OCTOBER TERM, 1955.

No. 533

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

versus

BERTHA KAUFMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitoner, The Western Union Telegraph Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on July 28, 1955 which, by a divided Court, reversed a judgment of the United States District Court for the Northern District of Texas.

OPINIONS BELOW.

The opinion of the District Court (R. 14-17) is reported in 124 F. Supp. 146. The opinion of the Court of Appeals (R. 24-39) is reported in 224 F.2d 723.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 28, 1955 (R. 40). Petition for rehearing was duly applied for on August 17, 1955 (R. 47), and denied on August 31, 1955 (R. 54). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED.

Whether, under the Federal Rule, recovery of damages may be had for physical injuries alleged to have resulted from mental anguish due to negligence in delivery of an interstate telegram.

STATUTE INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra*, p. 10.

STATEMENT.

Jurisdiction in the District Court was founded on diversity, 28 U.S.C. Section 1332; pursuant to leave of the Court of Appeals, 224 F.2d at page 725, plaintiff on August 6, 1955, filed in that Court a First Amended Complaint clearly alleging plaintiff's residence and citizenship in Texas and defendant's in New York.

Respondent sued for $20,000.00 damages for mental anguish and physical injury alleged to have been sustained by her as a result of petitioner's negligence in delivering an interstate telegraphic message from respondent's daughter. The telegram, from Tulsa, Oklahoma, to Dallas, Texas, announced the arrival of respondent's daughter. It was alleged to have been negligently transmitted by petitioner as a death message, although not such a message in fact, and was delivered to respondent by her hotel clerk with the statement, "I am sending up a death message for you." (R. 12.) Thereupon, respondent "went into a state of shock" from which she suffered "extreme mental and physical pain and anguish" and "as a result" "received permanent and disabling injuries." (R. 3.) Petitioner answered the suit on the merits and also moved for summary judgment.

At the hearing on motion for summary judgment on September 6, 1954, the Trial Judge sustained the motion "because it has long been the rule that that (mental anguish and physical consequences thereof resulting from negligence in the handling of interstate message) cannot be a recovery in the United States Court." (R. 14.) In the Court's written reasons for judgment, the Court relied upon a series of decisions of other Federal Courts and the decisions of the Supreme Court of the United States in the cases of *Southern Express Company v. Byers*, 240 U.S. 612, 36 S. Ct. 410, 60 L. Ed. 825, and *Western Union Tel. Co. v. Speight*, 254 U.S. 17, 41 S. Ct. 11, 65 L. Ed. 104.

Upon appeal from the District Court's dismissal of the suit, the Court of Appeals reversed (R. 24), one Judge dissenting (R. 39).

In reversing the District Court, the Court of Appeals held that although the Supreme Court of the United States has specifically ruled that there could be no recovery solely for mental anguish in connection with the delivery of an interstate telegram, the Supreme Court had not yet passed upon the question whether there should be recovery "for physical injuries resulting from emotional distress wrongfully or negligently caused." (R. 35.) The Court stated that it did not feel that there were any controlling decisions of the Supreme Court of the United States and that it felt that the merits of the respondent's claim outweighed "policy considerations which some courts have held to prevent a recovery in such cases." (R. 38.)

Petition for a rehearing (a) before the Court of Appeals *en banc*, or (b) in the alternative before the Division before whom the matter was originally heard, was denied, with one Judge dissenting.

SPECIFICATION OF ERROR TO BE URGED.

The Court of Appeals erred in holding that recovery could be had under the Federal Rule for physical pain and suffering alleged to have resulted from mental anguish incident to negligence in the delivery of an interstate telegram, even though no recovery could be

had for mental anguish itself under the well-established principles enunciated by the Supreme Court of the United States.

REASONS RELIED ON FOR GRANTING THE WRIT.

The Court below has decided an important question of Federal law which has not been, and should be, settled by this Court.

Prior to the instant decision, no court, Federal or State, has ever permitted recovery *under the Federal Rule* for physical pain and suffering alleged to have resulted solely from mental anguish, except possibly under special circumstances where the defendant's conduct was intentional, wilful or wanton in character.[1]

On the contrary, every court which has considered this specific matter *under the Federal Rule* has held that "physical injuries following emotional distress afford no ground for recovery." [2]

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[1] The Court of Appeals below refers to two Federal decisions. Belt v. St. Louis-San Francisco Railway Co., 195 F.2d 241 and Baltimore & O.R. Co. v. McBride, 36 F.2d 841. The first of these dealt solely with the law of Oklahoma. Both cases involved actual physical injury for which recovery could be had independently of mental suffering. And neither involved the "Federal Rule". It is respectfully submitted that the Court obtained no support from these two decisions, neither of which was considered by respondent's counsel of sufficient relevancy to be cited in his brief.

[2] See opinion of the Court of Appeals citing Tyler v. Western Union Tel. Co., C.C. W.D. Va., 54 Fed. 634; Jones v. Western Union Tel. Co., D.C. S.D. Cal., 233 Fed. 301; Ey v. Western Union Tel. Co., D.C. N.D. Cal., 298 Fed. 357; Mees v. Western Union Tel. Co., D.C. S.D. Fla., 55 F.2d 691. See also Western Union Telegraph Co. v. Conway, 57 Ariz. 208, 112 Pac.(2d) 857 (1941) and Pullman Co. v. Dudley (Tex. Civ. App.) 77 S.W.(2d) 592.

Quotations from the reasoning of some of the Federal Courts on this point are set forth in Appendix B hereof, *infra*, p. 12.

The principle involved is one of the utmost importance. If recovery is to be permitted for physical suffering resulting from mental anguish under the broad rule laid down by the court below, there will be an inducement for all claimants in mental anguish cases to claim resulting physical suffering which can be simulated as easily as mental anguish, readily supported by medical testimony and as difficult to disprove and for all practical purposes the doctrine enunciated by the Supreme Court of the United States in *Southern Express Company v. Byers*, 240 U.S. 612, 60 L. Ed. 825, 36 S. Ct. 410; and *Western Union Telegraph Company v. Speight*, 254 U.S. 17, 65 L. Ed. 104, 41 S. Ct. 11, denying recovery for mental anguish, will be at an end; it is reasonable to expect that claims against telegraph companies, telephone companies, railroads and others for mental anguish based upon negligence in the performance of their public duties will be accompanied by allegations to the effect that the mental anguish resulted in physical suffering or injury; logically, the rule laid down by the Court of Appeals may be extended to every situation where a negligently written or spoken word causes mental anguish allegedly resulting in physical injury; and the floodgates of litigation will be truly opened and there will follow an enormous incidence of lawsuits, both in numbers and in dollars, where damages are sought for conditions with regard to which a wise public policy has heretofore precluded recovery. A

burden on commerce would result, by reason of an inordinate liability on the carrier.

Admittedly, the principle established in the instant case is contrary to the decisions of the four other Federal Courts which have considered this matter. We submit that it is also in conflict with, if not contrary to, the decisions of the United States Supreme Court in the *Byers* and *Speight* cases.[3]

Indeed, we submit that it is also in conflict with, if not contrary to, the Fifth Circuit's own decision in the landmark case of *Western Union v. Wood*, 57 Fed. 471, cited by the Supreme Court of the United States in the *Byers* case.

The present case has been heard by four Judges, of whom two[4] would permit recovery and two[5] would deny recovery.

In the present posture of this case the judgment of the Court of Appeals is non-final: It has reversed the granting by the District Court of defendant's motion for sum-

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[3] While, as the Court of Appeals points out, the Supreme Court did not have before it, specifically, a claim for physical suffering caused by mental anguish, nevertheless the court in its opinion in the Byers case cited as authority for its holding the case of Tyler v. Western Union Telegraph Co. (Footnote 2), which involved a claim for physical suffering arising from mental anguish. The conclusion appears inescapable that if there can be no recovery for the principal alleged injury, there can be no recovery for mere incidents or consequences. This is the conclusion reached by all of the other Federal Courts which have specifically considered this matter.

[4] Circuit Judge Rives and District Judge Dawkins, Sr.

[5] District Judge DeVane (dissenting) and District Judge Atwell (Trial Judge).

mary judgment and has remanded the cause "for further proceedings consistent with this opinion", i.e., for trial on the merits. Despite this, petitioner strongly urges that this case is within one or more of the types of exception to the usual practice of this court not to grant certiorari to review a non-final judgment, (referred to in Stern and Gressman "Supreme Court Practice", Second Edition, at pages 130-131). The question of law presented is clearly important and of broader application than merely to this defendant. If petitioner's contention is found sound by this court, resulting in a reinstatement of the judgment of the District Court, further proceedings in the cause would be unnecessary.

The instant case, involving a very important principle, not only to applicant and other businesses subject to the Federal rule but to the court also, having been decided by the narrowest of margins, is an apt situation and a proper occasion for the exercise of the supervisory jurisdiction of this court.

CONCLUSION.

It is requested that certiorari be granted.

Respectfully submitted,

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APPENDIX A.

Jurisdiction over interstate (and foreign) telegraph (and telephone and radio) communication was conferred on the Federal Communications Commission by the Communications Act of 1934 (47 U.S.C. Section 151 *et seq.*, June 19, 1934, Chapter 652, 48 Stat. 1064; and May 20, 1937, Chapter 229, 50 Stat. 189, amending Section 1), the pertinent provisions being as follows:

> "SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.
>
> "SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons

engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone."

APPENDIX B.

Tyler v. Western Union Tel. Co., 54 F. 634, (Cir. Ct., W.D. Va., 1893):

> "And counsel for plaintiff, as if anticipating this, has alleged in his declaration and argued that there has been physical suffering and injury resulting from the mental anxiety of the plaintiff, and undertakes in his argument so to weave the two together as to give the injuries the nature necessary for the maintaining of this action. But the court thinks the sickening of the body in consequence of anxiety of mind is too remote a result of the negligence complained of to give the case the elements which it should possess in order to maintain the action."

In *Jones v. Western Union Tel. Co.*, 233 F. 301 (D.C. S.D. Cal. S.D. 1916).

> "Within the limits of the rule as thus announced, sickness which is merely a sequel of mental suffering or anguish cannot be differentiated from mental suffering or anguish itself. To a person of unusual sensibilities or refinement, comparatively slight mental anguish might cause serious illness; but it would be obviously impossible to draw the line of demarcation between mere mental suffering on the one hand, and resulting illness or sickness upon the other, and consequently impossible to adopt any standard by which a jury could be guided in the allowance of relief. If the sickness be but an aggravated form of mental suffering, it would still be but mental suffering and therefore not a basis for damages; if some

entirely distinct form of sickness should ensue, still it could not reasonably have been anticipated, and consequently could not be said to have been a proximate result of the original negligence."

Ey v. Western Union Tel. Co., 298 F. 357 (D.C., N.D. Cal., 1924):

"The rule is well settled, in the federal courts, at least, that mere mental pain and anguish are too vague for legal redress where no injury is done to person, property, health, or reputation. Southern Express Co. v. Byers, 240 U.S. 612, 36 Sup. Ct. 410, 60 L. Ed. 825, L.R.A. 1917A, 197; Western Union Telegraph Company v. Speight (decided October 25, 1920) 254 U.S. 17, 41 Sup. Ct. 11, 65 L. Ed. 104. These cases fully dispose of the case, so far as the claim for damages for mental pain and anguish is concerned.

"Can there, then, be a recovery for physical and bodily injury which follow as a mere sequel to the mental anguish? It would seem not. If there can be no recovery for the principal thing, there can be no recovery for mere incidents or consequences. It was so held in Jones v. Western Union Telegraph Company (D.C.) 233 Fed. 301, and that case is fully supported by the authorities cited."

Mees v. Western Union Tel. Co., 55 F.(2d) 691 (D.C., S.D. Fla., 1932):

"Counsel for plaintiff, while recognizing this authority (Byers case) as final in the federal courts, nevertheless make the argument that the court did not, in that decision, decide adversely to the re-

covery of sickness induced by mental suffering; that the language of the court viz. 'where no injury is done to person, property, health or reputation,' is broad enough to include injury to health resulting from mental anguish. (Matter in parenthesis added.)

"It is conceded by both counsel that the only cases squarely in point are Jones v. Western Union (D.C.) 233 F. 301, 304, and Ey v. Western Union (D.C.) 298 F. 357. The first named case, upon which authority the second was decided, says: 'Within the limits of the rule as thus announced, sickness which is merely a sequel of mental suffering or anguish cannot be differentiated from mental suffering or anguish itself.' * * *

"With the reasoning in this case, I concur. If mental suffering alone cannot be the basis of an action, sickness resulting therefrom is not the proximate result of the negligence of the defendant. The mental suffering is the cause of it, and, mental suffering not being an element of damage, there can be no logical connection between the sickness and the conduct of the defendant."

APPENDIX C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 15346

BERTHA KAUFMAN,
Appellant,

versus

WESTERN UNION TELEGRAPH COMPANY,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(July 28, 1955.)

Before RIVES, Circuit Judge, and DAWKINS and DeVANE, District Judges.

RIVES, Circuit Judge: This appeal is from a summary judgment for the defendant, Western Union Telegraph Company, the district court holding that for negligent

delivery of an interstate telegram and wrongfully informing the addressee that it was a death message when in fact it was not, there can be no recovery of damages for mental anguish nor for physical illness and medical expenses ensuing from such mental anguish.[1]

A preliminary question of federal jurisdiction not raised by the parties, but which the Court is bound to consider sua sponte, has given us some concern. The complaint does not affirmatively allege that the parties are citizens of different states. Its averments are: "That the plaintiff is a resident of Dallas, Dallas County, Texas"; "That the defendant, Western Union Telegraph Company, is a corporation organized under law with an office and place of business in Dallas, Dallas County, Texas, where service of citation may be had." The amount sued for, $20,000.00, is, of course, more than the jurisdictional amount. The complaint also alleges that the telegram was transmitted from Tulsa, Oklahoma to Dallas, Texas, and it may be that a suit for damages resulting from negligence in the delivery of an interstate telegram arises under the Constitution, laws or treaties of the United States, so as to give federal jurisdiction, 28 U.S.C.A. 1331, but we have been cited to no case so holding, and we do not find it necessary to decide that question. For jurisdiction to be founded upon diversity of citizenship, 28 U.S.C.A. 1332, it must affirmatively appear from the complaint that the plaintiff is a citizen of one state and the defendant a citizen of another. It is provided, however, by 28 U.S.C.A. 1653 that: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

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1 The opinion of the district court is reported in 124 F. Supp. 146.

The theory seems to be that "if jurisdiction actually exists from the facts at the time when the complaint was filed, even though not properly pleaded * * *, the formal defect in the pleadings did not deprive the court of jurisdiction at the time when the action was filed, if such defect was later corrected." *Stern v. Beer*, 6th Cir., 200 F. 2d. 794, 795. *Cf. Finn v. American Fire & Casualty Co.*, 5th Cir., 207 F. 2d. 113, 115. In all probability the plaintiff being a resident of Texas is also a citizen of that State. We are confident that the Western Union Telegraph Company is not incorporated under the laws of Texas. The 1950 edition of the Encyclopedia Britannica, Vol. 23, p. 533, indicates that it is a New York corporation. Since the question is not raised by the parties, and the allegations of jurisdiction if defective may be amended, we proceed to a consideration of the case on its merits. However, so that there may be no mistake about jurisdiction, unless the appellant, pursuant to 28 U.S.C.A. 1653, quoted *supra*, files an appropriate amendment in this Court within ten days after this decision, the case will then be placed back on the rehearing docket and briefs invited on the question of jurisdiction.

The complaint alleged that the plaintiff resided at the Melrose Hotel in Dallas, Texas. She knew that her daughter, Janice Kaufman, was en route from Tulsa, Oklahoma to Dallas, Texas by airplane. Prior to departing by plane from Tulsa, the daughter dispatched a telegram over defendant's telegraph system. According to defendant's answer, the message was addressed to plaintiff, signed "Janice", and read, "Will be home at 7:46 American Airlines tonight."

In pertinent part the complaint continued as follows:

"Plaintiff would further show that the defendant in transmitting said telegram from Tulsa, Oklahoma to Dallas, Texas, did transmit same as a 'death message' and caused said message to be received at its station in Dallas, Texas, and placed same in an envelope and delivered same to its messenger and did advise said messenger that same was a death message, and did further cause said message to be by its messenger and agent delivered to the Melrose Hotel. That said messenger and agent of the defendant Western Telegraph Company represented said message to be a death message to this plaintiff.

"Plaintiff would show that she is a woman with high blood pressure with a sensitive and nervous temperament. Immediately upon the receipt of the 'death message' she was rendered violently ill and went into a state of shock and it was necessary for her to receive immediate medical attention. Plaintiff would show that she has remained under the care of a doctor since that date. Plaintiff would further show that she received permanent and disabling injuries as a result of the receipt of the said death message, and that same has aggravated her condition of high blood pressure and has caused her to become weak and debilitated; has produced serious and lasting injuries to her ability to stand and to move about. In addition plaintiff would show that she has suffered extreme mental and physical pain and anguish as a direct and proximate result of said death message, all to her damage in the sum of $20,000.00.

"Plaintiff would show that the defendant was negligent in the transmission of the telegraphic message from Janice Kaufman to this plaintiff, and was negligent in delivering said message to its agent and messenger in representing said message to be a death message; and that said messenger and agent was negligent in causing the message to be represented as a death message to this plaintiff. That each act of negligence was a proximate cause of this plaintiff's injury and damage."

In addition to taking issue with the material allegations of the complaint, the defendant filed three complete affirmative defenses, which are hereinafter quoted. No affidavits were offered by either party; and the hearing of the defendant's motion for summary judgment consisted entirely of the following:

"The Court: May I ask you gentlemen to make an open Court agreement so I will understand the facts as presented by both parties?

"That is, that the plaintiff here was a guest at a hotel and that the delivery boy of the Western Union Telegraph Company, the defendant, handed a message to the clerk of the hotel, saying at that time, 'Here is a death message.' That, thereupon, the hotel clerk called the plaintiff in her room and said, 'I am sending up a death message for you.'

"Are those the facts?

"Mr. Miller: We will not dispute that. Yes, I will agree to that.

"The Court: Is that a fact?

"Mr. Miller: I will agree to that.

"The Court: Does the plaintiff agree those are the facts?

"Mr. Mullinax: I will agree that those are the facts, with this exception; it is my understanding that the Western Union agent was actually standing there by the phone and directed the clerk to tell the plaintiff that it was a death message. The messenger actually was passing on the information. He told the clerk that it was a death message. As I understand, it all happened at one time, that is what was represented to the plaintiff.

"Mr. Miller: I can't agree to that, for the reason, I understand it was a little Mexican boy, and I cannot agree that he was telling the clerk to call the lady.

"The Court: I can't enter any judgment unless you gentlemen agree upon the facts.

"Mr. Miller: The facts as plead in that respect, I agree to it, he has added something outside of the pleading, that he is not sure of himself, as to whether the boy would not leave the premises until the clerk had relayed the information upstairs.

"I will stipulate exactly as plead, that it is true that the young man went to the hotel clerk.

"The Court: I stated the facts, do you agree to that?

"Mr. Miller: Yes.

"The Court: Does the other side agree to that?

"Mr. Mullinax: Yes.

"The Court: Then I sustain the motion for summary judgment for the defendant, because it has long been the rule that that cannot be a recovery in the United States Court.

"Mr. Mullinax: Please note our exception, and we will give notice of appeal."

On a motion for summary judgment, the court must take that view of the pleadings, of the evidence if any, and of the record most favorable to the party against whom summary judgment is sought. 6 Moore's Federal Practice, 2nd ed., Para. 56.15(1), page 2114; *Purity Cheese Co. v. Frank Ryser Co.*, 7th Cir., 153 F. 2d. 88.

Under that rule, defendant was, of course, not entitled to summary judgment on its pleadings simply denying the allegations of the complaint, but must rely on one or more of its affirmative defenses. For convenience, let us consider the three affirmative defenses in reverse order.

"Affirmative Defense No. 3.

"Any act of the messenger in making the alleged statement to the Hotel Clerk was wholly unauthorized, without the scope of his employment, and hence not binding on the defendant."

Looking at the case in the light most favorable to the plaintiff, we cannot agree with the opinion of the district court that, "When the clerk of her hotel, who was not an agent of the defendant, telephoned her that he was sending up a death message, it was wholly gratuitous, so far as the defendant is concerned, and the defendant is not, and, was not bound by what the hotel clerk said." To the contrary, the complaint alleged that the defendant trans-

mitted the message as a "death message" and advised its messenger that it was a death message.

Construing the complaint most favorably to the plaintiff, the messenger was acting within the scope of his employment when he handed the message to the clerk of the hotel, saying at the time, "Here is a death message"; it was reasonably to be anticipated that the hotel clerk would relay such information to the plaintiff; and, hence, the defendant was responsible for such conduct on the part of the hotel clerk.

"Affirmative Defense No. 2.

> "Plaintiff's alleged mental anguish and physical suffering were based solely on wholly unwarranted mistaken beliefs or apprehensions or fears as to conditions which were wholly imaginary and hence damages therefor are not recoverable."

The message itself charged the defendant with notice that the addressee might be expecting the sender, "Janice", to arrive home by plane. The trier of facts could reasonably conclude that to misinform the addressee that she was receiving a death message would naturally be expected to result in extreme mental anguish and consequent physical injury. On this defense, defendant was not entitled to summary judgment.

The really serious and important question to be decided on this appeal is presented by affirmative defense No. 1.

"Affirmative Defense No. 1.

> "The telegram shows on its face to be an interstate telegram and by reason of such fact

mental anguish unaccompanied by actual physical hurt is not recognized in the United States Courts, the alleged physical injuries having sprung from a purely mental condition."

On June 18, 1910, Congress amended the Interstate Commerce Act (36 Stat. 539, 545) so as to place interstate telegraphic communication under the jurisdiction of the Interstate Commerce Commission. Such jurisdiction was transferred to the Federal Communications Commission with the enactment of the Communications Act of 1934 (47 U.S.C.A. Secs. 151, et seq.). Ever since federal control was thus established, telegraph companies, as to interstate transactions, have been subject to a national and uniform rule of law. *Postal Tel.-Cable Co. v. Warren-Godwin Co.*, 251 U.S. 27; *Western Union Tel. Co. v. Boegli*, 251 U.S. 315; *Western Union Tel. Co. v. Speight*, 254 U.S. 17; 52 Am. Jur., Telegraphs and Telephones, Sec. 142.[2] Notwithstanding *Erie R. Co. v. Thompkins*, 304 U.S. 64, interstate message transactions are still governed by federal law to the exclusion of conflicting state law; and that means that they are governed not merely by the provisions of the federal statutes, but by "federal common law" as well. *O'Brien v. Western Union Tel. Co.*, 1st Cir., 113 F. 2d. 539, 541; *Sola Electric Co. v. Jefferson Electric*

[2] On the other hand, it is well settled as stated in Huff v. Louisville & Nashville R. Co., 5th Cir., 198 F. 2d. 347, 348, that:

"In the absence of regulation by Congress, the liability of a common carrier to an interstate passenger is to be determined in accordance with the law of the state where the injury occurs. 10 Am. Jur., Carriers, Sec. 1111; Atlantic Coast Line R.R. Co. v. Mitchell, 5 Cir., 157 F.2d 880; Atlantic Greyhound Corp. v. McDonald, 4 Cir., 125 F.2d 849; Tobin v. Pennsylvania R.Co., 69 App.D.C. 262, 100 F.2d 435; Wells v. Mo.Pac. R.Co., 8 Cir, 87 F.2d 579; American Law Institute Restatement of Conflict of Laws, Secs. 378 and 379."

Co., 317 U.S. 173, 176; Moore's Commentaries on the U.S. Judicial Code, Sec, 0.03(45), pp. 340, et seq.

The subject is not mentioned in the federal acts, but the decisions of the Supreme Court have settled the doctrine that in actions governed by federal law a suit cannot be maintained for mental suffering alone. *Southern Express Co. v. Buyers*, 240 U.S. 612; *Western Union Tel. Co. v. Speight*, 254 U.S. 17. Appellant urges upon us that modern developments in the medical and legal fields have rendered those decisions obsolete.

No doubt the law as to liability for mental anguish alone is in a stage of development. In the 1948 Supplement to the A.L.I., Restatement of the Law, a new Section 46 was substituted for original Section 46 of the Restatement of Torts, the new section reading as follows:

> "§46. Conduct Intended To Cause Emotional Distress Only.
>
> "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable
>
> "(a) for such emotional distress, and
>
> "(b) for bodily harm resulting from it."

The caveats, comments thereon and statements of reasons for the change are illuminating, and in turn refer to many authorities and texts.[3] American Jurisprudence also

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[3] "*First Caveat:* The Institute expresses no opinion as to whether one who recklessly causes severe emotional distress to another is or is not liable for it.

"*Second Caveat:* The Institute expresses no opinion as to whether one who negligently causes severe emotional distress is, in certain circumstances, liable for it.

"*Comment to Caveats:*

"The law concerning the extent of the legal protection given to the interest in freedom from emotional distress is still de-

comments that: "Some learned text writers are of the opinion that legal protection to the interest in mental and emotional tranquillity is in an intermediate stage of development.[3] * * *

"[3] See Magruder, Calvert, 'Mental and Emotional Disturbance in the Law of Torts,' 49 Harvard L. Rev. p. 1058.

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veloping. There is not yet a sufficient body of decisions to formulate general rules concerning unintentional invasions of this interest. For that reason the Institute takes no position except with respect to intentional invasions and the situations involved in § 47.

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Reason for Change: This is a part of the law of torts in which real developments have occurred in recent years and this development is continuing. The cases which have appeared since 1934 establish that the interest in freedom from severe emotional distress is protected against intentional invasion. Among the more recent cases are: Melvin v. Reid, 1931, 297 P. 91, 112 Cal.App. 285; Mau v. Rio Grande Oil Co., 1939, 28 F.Supp. 845; Interstate Life etc. Co. v. Brewer, 1937, 193 S.E.458, 56 Ga.App. 599; Barnett v. Collection Service Co., 1932, 242 N.W. 25, 214 Iowa 1303; Blakely v. Shortal's Estate, 1945, 20 N.W. 2d 28, 236 Iowa 787; Klumbach v. Silver Mount Cemetery Ass'n, 1934, 275 N.Y.S. 180, 242 App. Div. 843, 1935, 198 N.E. 386, 268 N.Y. 525; La Salle Extension University v. Fogarty, 1934, 253 N.W. 424, 126 Neb. 457, 91 A.L.R. 1491; Kirby v. Jules Chain Stores Corporation, 1936, 188 S.E. 625, 210 N.C. 808. The cases are fully reviewed in the recent literature which contains extensive citations of authorities. See Goodrich 'Emotional Disturbance as Legal Damage' (1922) 20 Michigan Law Review 497; Magruder 'Mental and Emotional Disturbance in the Law of Torts' (1936) 49 Harvard Law Review 1033; Prosser 'Intentional Infliction of Mental Suffering: A New Tort' (1939) 37 Michigan Law Review 874. Eldredge 'Tort Liability for Mental Distress' printed in Modern Tort Problems (1941) pages 71-102, and Smith 'Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli' (1944) 30 Virginia Law Review 194. The latter article by Dr. Hubert Winston Smith, L.L.B., M.D., is an exhaustive discussion of the cases from both a medical and a legal point of view, and he states at page 229: 'Assume there is no impact or injury inflicted from without, but a *wilfully* or *maliciously* causes B to suffer mental anguish. Courts are agreed that B may recover damages for this intentional tort even though it causes him no physical injury or dis-

> "See also Goodrich, Herbert F.; 'Emotional Disturbance as Legal Damage,' 20 Mich. L.Rev. pp. 510, 513, declaring: 'It now only remains to break loose from the arbitrary rule requiring such protection to be coupled with some other claim before affording redress. This step, it is submitted, we may see taken any time. That is the way the common law grows.' "

52 Am. Jur., Torts, §46, p. 391. We are nevertheless constrained to hold that, if the decisions of the Supreme Court are to be overruled as obsolete, such ruling must come from that Court alone.

In each of these Supreme Court cases, however, the claim was for mental suffering only, and the Court was somewhat emphatic in limiting its ruling to such a claim. See 240 U.S. at p. 615; 254 U.S. at p. 18. Here, the complaint charges that the plaintiff was rendered violently ill, that she went into a state of shock, that her condition of high blood pressure was aggravated, that she was caused to become weak and debilitated, that serious and lasting injuries ensued to her ability to stand and to move about, that it was necessary for her to receive immediate medical attention, and that she has remained under the care of a doctor ever since.

The Supreme Court has not yet ruled that there can be no recovery for physical injuries resulting from emo-

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ability, but only an oppressive and undersirable disturbance of mental tranquillity.'

"The change in Section 46 is necessary in order to give an accurate Restatement of the present American law. There is a definite trend today in the United States to give an increasing amount of protection to the interest in freedom from emotional distress."

tional distress wrongfully or negligently caused; and we have been cited to no decision of a Federal Court of Appeals so holding. We observe that the Tenth Circuit, in commenting upon the law of the State of Oklahoma, used the following expression:

> "The courts generally draw a line between the purely physiological and the psychological, the corporeal and the psychical. Emden v. Vitz, 88 Cal.App.2d 313, 198 P.2d 696; Kelly v. Lowney & Willams, 113 Mont. 385, 126 P.2d 486; Cherry v. General Petroleum Corp., 172 Wash. 688, 21 P.2d 520; Maynard v. Oregon R. Co., 43 Or. 63, 72 P.590. And, the majority of the courts compensate for bodily injuries produced by or resulting from mental disturbances, although unaccompanied by any physical impact or concussion. In such cases, the right to recover is dependent upon the nature of the results rather than the nature of the tortious conduct. Emden v. Vitz, 88 Cal.App.2d 313, 198 P.2d 696 and cases cited therein; Taylor v. Pole, 16 Cal. 2d 668, 107 P.2d 614; Frazee v. Western Dairy, 182 Wash. 578, 47 P.2d 1037; 52 Amer.Jur. Torts, Sections 45 and 55." Belt v. St. Louis-San Francisco Ry. Co., 195 F.2d 241, 243.

The Sixth Circuit in *Baltimore & O. R. Co. v. McBride*, 36 F. 2d. 841, 842, had the following to say:

> "Nor was there any ground for application of the doctrine that damage from nervous shock unattended by physical injury is considered too remote to support recovery. Cf. Miller v. R.R. Co., 78 Ohio St. 309, 85 N.E. 499, 18 L.R.A.(N.S.) 949, 125 Am.St.Rep. 699. Where both the physical in-

> jury and the nervous shocks are proximately caused by the same act of negligence, there is no necessity that the shock result exclusively from the physical injury. Each forms a part of the natural and indivisible result, and the fact that the plaintiff has suffered physical injury as part of the aggregate of the attending results precludes assertion of the defense that the connection between the negligent cause and the resulting nervous shock is too remote for legal contemplation."

On the other hand, as pointed out in the opinion of the District Court, 124 F.Supp. at 147, a number of Federal District Courts have ruled that physical injuries following emotional distress afford no ground for recovery. See *Tyler v. Western Union Tel. Co.*, C.C. W.D.Va., 54 Fed. 634; *Jones v. Western Union Tel. Co.*, D.C.S.D.Cal., 233 Fed. 301; *Ely v. Western Union Tel. Co.*, D.C.N.D.Cal., 298 Fed. 357, *Mees v. Western Union Tel. Co.*, D.C.S.D.Fla., 55 F. 2d. 691.

American Jurisprudence states that, "In respect of the right to maintain an action for a bodily injury or illness resulting from a mental or emotional disturbance, the authorities are in a state of dissension probably unequaled in the law of torts." 52 Am. Jur., Torts, Sec. 55, p. 399. A note to the text calls attention that:

> "*In England*, the later cases support the right to maintain an action for a bodily injury or illness resulting from a mental disturbance, notwithstanding the contrary rule supported in Victorian R. Comrs. v. Coultas (1888) LR 13 App. Cas.222, 8 Eng.Rul Cas 405—PC, the case chiefly relied

> upon in the United States by courts supporting the rule denying recovery. *Anno:* 11 ALR 1134, s.40 ALR 985, 76 ALR 684, and 98 ALR 403; 12 Ann Cas 744. See also Janvier v. Sweeney [1919] 2 KB(Eng) 316, 9 BRC 579-CA." 52 Am. Jur., supra at p. 400.

In Sections 50 to 54 of the same text, the various reasons assigned by the courts for the denial of the right to maintain an action predicated upon a mental or emotional disturbance alone are considered and discussed, such as the difficulty of proof, the difficulty of measuring the loss, the ordinary triviality of harm, the multiplication of litigation and inharmonious results. The distinction between the rationale of that doctrine and cases where bodily injury or illness ensue is well summarized in 52 Am.Jur., Torts, Sec. 59, p. 406:

> "This distinction is based upon the ground that in an action for a bodily injury or illness resulting from a mental or emotional disturbance, the basis for the action is the bodily injury or illness, an interest always afforded protection by law, while the mental or emotional disturbance, an interest not generally afforded independent protection by law, is merely a link in the chain of causation."

See, also, the series of notes in 11 A.L.R. 1119; 40 A.L.R. 983; 76 A.L.R. 682; and 98 A.L.R. 402.

Enough has been said to indicate that the literature on the subject is voluminous, if not exhaustive. The extremely valuable and thorough article of Dr. Hubert Winston Smith on Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli begins in 30

Va. Law Review at p. 193 and concludes on p. 317. For ourselves, we can see no more reason for denying recovery where physical injury follows mental anguish than in those cases ordinarily encountered where mental anguish follows physical injury. The injustice of denying legal redress to a person wrongfully and seriously injured as alleged in the present complaint outweighs in our minds the policy considerations which some courts have held to prevent a recovery in such cases. Accordingly, feeling that we are not bound by any controlling decisions of the United States Supreme Court, and that our decision is in line with the views of the Tenth Circuit expressed in *Belt v. St. Louis-San Francisco Ry. Co., supra,* and the views of the Sixth Circuit in *Baltimore & O. R. Co. v. McBride, supra,* we hold that the complaint states a claim upon which recovery may be had for the physical injury and illness resulting from the mental or emotional disturbance, and, hence, that it was error to enter summary judgment for the defendant.

The judgment is, therefore, reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

DeVANE, District Judge: I dissent.

A True Copy:
Teste:

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Clerk of the United States Court of Appeals for the Fifth Circuit.